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8 Attorneys for Defendant  
 COXCÔM, INC.,  
 9 dba COX COMMUNICATIONS, INC.

10 **UNITED STATES DISTRICT COURT**  
 11 **SOUTHERN DISTRICT OF CALIFORNIA**  
 12 **SAN DIEGO DIVISION**

13 LYNN LYONS, on Behalf of Herself and All  
 Others Similarly Situated,

14 Plaintiffs,

15 v.

16 COXCOM, INC., dba COX  
 17 COMMUNICATIONS, INC., COX  
 ENTERPRISES, INC., and DOES 1-250,

18 Defendants.

19 Case No. 08-CV-02047-H (CAB)

20 **DEFENDANT COX COMMUNICATIONS  
 INC.'S NOTICE OF MOTION AND  
 MOTION TO:**

21 **(1) STRIKE THE CLASS ALLEGATIONS  
 AND DISMISS THE FIRST AMENDED  
 COMPLAINT FOR LACK OF SUBJECT  
 MATTER JURISDICTION; AND**

22 **(2) DISMISS THE FIRST AMENDED  
 COMPLAINT FOR FAILURE TO STATE  
 A CLAIM AND FOR FAILURE TO  
 PLEAD WITH PARTICULARITY**

23 **[F.R.C.P. §§ 9, 12(b)(1), 12(b)(6), 12(f) & 23]**

24 **Hearing Date:** May 18, 2009  
**Time:** 10:30 a.m.  
**Judge:** Hon. Marilyn L. Huff  
**Dept:** Courtroom 13, 5th Floor

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2 **TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:**

3 **PLEASE TAKE NOTICE** that on May 18, 2009, at 10:30 a.m., or as soon thereafter as  
4 the matter may be heard, in Courtroom 13 of the United States District Court, Southern District of  
5 California, San Diego Division, located at 880 Front Street, San Diego, California, defendant  
6 Coxcom, Inc. dba Cox Communications, Inc. ("Cox") will, and hereby does, move this Court (1)  
7 to strike the class definitions and class allegations for failure to allege viable classes, and to  
8 dismiss the First Amended Complaint, under Rule 12(b)(1) of the Federal Rules of Civil  
9 Procedure, for lack of subject-matter jurisdiction; (2) to dismiss the entire action, under Rule  
10 12(b)(6), for failure to state a claim upon which relief can be granted; and (3) to dismiss the  
11 Consumer Legal Remedies Act claim for failure to plead that claim with particularity  
12 (Fed.R.Civ.P. 9(b).).

13 First, the complaint fails to allege ascertainable classes and otherwise to plead a class(es)  
14 that could be certified consistent with Federal Rule of Civil Procedure 23 under governing law.  
15 Plaintiff's new allegations show that adjudicating plaintiff's claims would require subscriber-by-  
16 subscriber "minitrials" to determine Cox's liability as to each subscriber. Because plaintiff has  
17 failed to allege viable classes, and because this Court's subject matter jurisdiction rests solely on  
18 the Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332(d), the Court should strike the  
19 class definitions and the class allegations pursuant to Rule 12(f), and then dismiss the action  
20 pursuant to Rule 12(b)(1).

21 Second, even if the complaint did allege a viable class or classes, the first and second  
22 claims (the Georgia law contract-based claims) and the California statutory claims under the  
23 Business & Professions Code and Civil Code (the third through seventh claims for relief) fail to  
24 state a claim upon which relief can be granted, because (inter alia) Cox's advertisements, do not  
25 promise unlimited high-speed P2P file sharing at a particular speed, and Cox's contractual  
26 disclosures negate the claims of breach of contract or actionable deceptive conduct.

27 Third, plaintiff has still not pleaded what was false about the advertisements that form the  
28 basis of her Consumer Legal Remedies Act claim, and thus fails to plead that claim with the

1 particularity required by Rule 9(b).

2 Fourth, Cox moves to strike the allegation that Cox Enterprises, Inc. is also a defendant to  
3 this action. Plaintiff dismissed Cox Enterprises on December 3, 2009. References to Cox  
4 Enterprises and the plural version of "Defendants" throughout the FAC should therefore be  
5 stricken. (FAC at ¶ 7, *passim*.) FED. R. CIV. PROC. 12(f).

6 This Notice of Motion and Motion to Dismiss, the Memorandum of Points and Authorities  
7 in support, and the Request for Judicial Notice in support of the motion, all filed herewith, all  
8 matters which the Court may take notice, the entire file in this action, and such oral and  
9 documentary evidence as may be presented at or before the hearing.

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11 DATED: April 2, 2009

COBLENTZ, PATCH, DUFFY & BASS LLP

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By: s/Richard R. Patch

Richard R. Patch

Attorneys for Defendant COXCOM, INC.,  
dba COX COMMUNICATIONS, INC.,

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